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No. 211.
Brief of Appellees
Br. of Catron for Appellees

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 211.

THE UNITED STATES,
Appellant,

vs.

M. R. PENDELL *and* J. ESCOBAR,
Appellees.

BRIEF OF APPELLEES.

T. B. CATRON,
Attorney for Appellees.

In the Supreme Court of the United States,

OCTOBER TERM, 1901.

THE UNITED STATES,
Appellant,

vs.

M. R. PENDELL and J. ESCOBAR,
Appellees.

This is an appeal by the United States from a decree of the Court of Private Land Claims, rendered for the confirmation of a grant to a tract of land known as the Santa Teresa Grant, consisting of four sitios, or four leagues of land, situate in Dona Ana County, New Mexico, and with the Gadsden Purchase.

It is alleged in the petition in substance that in the latter part of the eighteenth century the Spanish authorities at Pasa del Norte, in the State of Chihuahua, Mexico, granted to Francisco Garcia, a tract of land called Santa Teresa, containing four leagues or sitios, described as designated in the proceedings *ad perpetuum*, had in that city and the act of repossession given thereunder by the second Judge of the first instance, on January 16th, 1853 (Trans., pp. 9, 16).

It is also alleged in the petition for confirmation and Exhibit A filed therewith, that the muniments of title and official record thereof, were destroyed by

the American troops when they occupied Paso del Norte in 1846, or 1847;

That, in order to perpetuate the evidence of title of said land, José Maria Garcia, an heir of the original grantee, and executor of the estate of his mother, the wife of the original grantee, did, on January 7th, 1853, apply to the proper judicial authority at Paso del Norte, and asked for a revalidation of said title in accordance with the customs of Mexico; and that the evidence of certain witnesses mentioned in his application might be taken on certain interrogatories therein contained as to the occupation and possession of said land, its boundaries and existence of a grant or original muniments of title, *in order to supply in some manner the lack of the original muniments;* and that the judicial investigation thereon having been concluded, and there resulting thereby the establishment of the original boundaries, the said Judge of the first instance should give to him the possession which by law corresponded to him in the name of the Garcia heirs, his brothers and sisters; and that in such possession he should order them to be protected and defended without being disturbed or molested by any one, unless heard in court, in order that such possession *might serve them and their heirs as title and security* (Trans., Exhibit A, pp. 3, 4, 10 and 11, for the Petition made by J. M. Garcia to the second Judge of the first instance).

The said petition of said Garcia so made January 7, 1853 being a petition in fact to perpetuate the evidence of title and quiet the same in him and his co-heirs.

The said petition of José Maria Garcia was admitted by Bentura Lopez, the second Judge of the first instance, January 9, 1853; and the witnesses named therein were ordered to be cited to appear before him on January 11, 1853 (Trans., pp. 4 and 11).

On January 11, 1853, the witnesses named each appeared and were duly sworn, and gave their answers to the interrogatories (their answers will be

found in the Transcript in Plaintiff's Exhibit A, introduced in evidence on pp. 5, 6, 7, and 8 in Spanish, a translation of which, which is incorrect in part, will be found in the transcript at pages 12, 13, 14 and 15).

The principal incorrectness in the translation will be found in the answers of the witness, Franco Rascon, in Spanish, page 5, and the pretended translation on page 12.

A correct translation of the answer of said Franco Rascon, to the said third interrogatory propounded to him, is as follows:

"Interrogated in regard to the contents of a third interrogatory, he said: "That many times he had had in his hands the possession of the original documents (Documentus primordilas) of the Santa Teresa ranch, executed by one of the Lieutenant-Governors, who governed in this district about the end of the last century; that by reason of his father having been an official employee (empleado) in this village, a little after the year 1821, he saw the possession of said rauch registered (protocolisada) in the Archive (Archivo) of his father's office, and that, although he does not remember the date, yet he can affirm that said possession was from three to five leagues, which documents he knew were lost when the American troops took possession of the Archives of this town and occupied the house of José Maria Garcia; that the aforesaid is the truth in reference to the interrogatories which had been made to him, which he affirms and ratifies on the faith of the oath he has taken, signing it with the Judge and assisting witnesses.

I certify

FRANCO RASCON.
BENTURA LOPEZ.

Assisting witness:
FRANCISCO BARRON.
Assisting witness:
FELIZ LERMA."

The other answers of the said six witnesses contain some inaccuracies, but are not so radically wrong as to make any very material difference.

The said Franco. Rascon also testified in answer to the second interrogatory, that, from the year 1813, he had known the ranch of Francisco Garcia, called Santa Teresa, because he had been there several times before it was abandoned on account of the incursions of the Indians; that, when he came to town, he had heard trustworthy persons say that the Santa Teresa ranch was an old property of Francisco Garcia, whom he sometimes saw on said ranch with his servants and herds.

The next of said witnesses was Guadalupe Miranda, who, in answer to the second interrogatory stated "that it had been notorious in that town that, for some years the deceased, Francisco Garcia, and his children, possessed and occupied with their herds the Santa Teresa ranch."

And to the third interrogatory, "That he had been informed by trustworthy persons that they had seen some documents of such possession; that it is a notorious fact that, at the time of the occupation of this town by the American forces, said forces destroyed (destruyeron) a part of the public Archives; that they occuped José Maria Garcia's house, from which they took some documents relating to his property, and papers of importance, among which it is assured were the documents of said ranch, which ranch, according to his recollection, he was informed, comprised a body of four leagues."

The witness, José Maria Maese, in answer to the second interrogatory, stated: "That he had been at the Santa Teresa ranch several times; that it belonged to Francisco Garcia. * * * That, when he was very young, he had heard it said by respectable old persons that the said Francisco Garcia had had his stock on said ranch since about the latter part of the last century."

In answer to the third interrogatory he said: "That he remembered to have seen the title papers

of the Santa Teresa ranch, given by the Lieutenant-Governor of this town during the time of the Spanish rule; that he does not remember the date of said documents, but he is certain that they comprised a donation of four leagues; that it is notorious that the American forces, and also the Mexicans, abstracted a part of the Archives of this town in the year 1847 and 1848, and also that the Americans occupied the house of José Maria Garcia from whom they took some important papers, and he knows from credible persons that in said years the Messrs. Garcia lost the documents they had relating to Santa Teresa."

The witness Alejo Martinez, in answer to the fourth interrogatory said: "That he had served for more than twenty years in the family of the Messrs. Garcia, in different capacities, for which reason he was for some years, prior to 1820, on the Santa Teresa ranch, where the Messrs. Garcia had their herds of horses and large and small stock."

In answer to the fifth interrogatory he said: "That he knew the several adobe buildings of the principal house of the ranch of Santa Teresa, the corrals, and the shanties built of poles for the servants; that it was well known and notorious that one of the boundaries is in the lower bend of the Piedras Paradas; that, on the lower side, the river served as a boundary line; on the north side, the boundary line crossed the Cobrena Bend, and on the side of the plain, the ridge (ceja); that the ruins of the houses and corrals are still plainly to be seen, and that he can point them out; and that, although it is many years since he has been to the place, he believes he can yet designate the boundaries formerly recognized."

The witness Jose Abalos, in answer to the fourth interrogatory, said: "That he had served for more than ten years the family of the Messrs. Garcia in different capacities, for which reason he had for some years, prior to 1820, lived at the Santa Teresa

ranch, where the Messrs. Garcia had their herds of horses and large and small stock, of which deponent was a shepherd."

To the fifth interrogatory he said: "That he knew the several adobe constructions of the principal house of the Santa Teresa ranch; the corrals, and shanties, built of poles, where the servants lived, and in which the deponent also lived; that it was well known and notorious that one of the boundaries is the lower bend of the Piedras Paradas; on the lower side, the river served as a boundary line; on the north side, the line crosses the Cobrena Bend, and on the plain, the brow (ceja); the ruins of the houses and corrals are still fairly to be seen; that he can show the same, for he knows the place well, and all the boundaries of the Santa Teresa ranch."

The sixth and last witness examined by the second Judge of the first instance on that occasion was Julian Alday, who, in answer to the fourth interrogatory, said: "That he had served for more than twenty years the family of the Messrs. Garcia in different capacities, and for that reason had served on the ranch of Santa Teresa, where the family of the Messrs. Garcia had their herds of horses and large and small stock."

To the fifth interrogatory he said: "That he knew well the several adobe buildings of the principal house of the Santa Teresa ranch, and some shanties built of poles in which the servants lived; that it was well known and notorious that one of the boundaries is at the lower bend of the Piedras Paradas; on the lower side, the river served as a boundary; on the north side, the line crossed at the Cobrena Bend, and on the side of the plain, the brow (ceja); and that the ruins of the houses and corrals are still plainly visible; that the deponent can point them out, for he knows them very well."

On that petition and evidence taken, the said Bentura Lopez, as the second Judge of the first in-

stance, at Pasa del Norte, made a decree in words and figures as follows (Translated, p. 15):

"In view of the foregoing judicial inquiry with which the executor José Maria Garcia, *has proved legally the possession, that for many years they have had* of the ranch called Santa Teresa, above the dam of the town and the Molares Bend, and it *appearing that they have even had titles to said property*, and these have been lost, and from what appears, from the testament and judicial inquiry, there is given to the executor José Maria Garcia, for himself, and in the name of the co-heirs, without prejudice to any third party, proving a better right, the real, actual, personal, corporal possession, or, *that which better corresponds in law, by reason of immemorial possession, of the Santa Teresa ranch*, with the enjoyments and benefits of the *lands, woods* and *pastures, and all other products, to be found on said premises, and it is ordered that he be protected and defended therein, warning all not to interrupt or molest him in said possession and free use, that he may deem fit to make thereof*, without he being first heard and judgment rendered against him in court, after trial; and for the fulfillment of this mandate, the said José Maria Garcia will on the 16th day of the current month repair to the tract of land designated with the judge and witnesses, taking with him one or two persons who can point out the old boundaries. The second judge, and of the first instance thus decreed, directed and signed with the assisting witnesses. I certity

BENTURA LOPEZ.

Assisting witness:

FRANCISCO BARRON.

Assisting witness:

FELIZ LERMA."

(Trans., pp. 8, 15 and 16.)

Afterwards, on the 16th day of January, 1853, said Bentura Lopez as 2nd judge of 1st instance of

Canton Bravos, at Paso del Norte, accompanied by his assisting and instrumental witnesses, and by said José Maria Garcia, and said witness, Alejo Martinez, went upon the tract of land and marked the boundaries as shown by the witness as being the old boundaries, and which are described in the return made by said judge, found on pages 8, 9, 16 and 17 of the transcript, and in said return he stated, near the end of it: "and in testimony of true possession I led the executor, José Maria Garcia by the right hand upon the four leagues which are contained within the measurement executed, and within the old boundaries which were pointed out to me; I led him over them, *and I directed him to make those who were on the said premises leave them;* and in this possession *I ordered that he and his co-heirs and successors be protected and defended, so long as judgment be not rendered against them by a court after a trial;* and ordering that there be imposed upon those who may interrupt him in his possession the penalties of the law; with which proceeding this measurement was ended, there resulting therefrom the configuration of the land as is shown by the map attached to this possession (Exhibit B, bet. pp. 16 and 17). I also directed that there be given to the party in interest such copy of these proceedings as he may solicit, placing in the archives of my office the originals."

All of the foregoing proceedings are contained in Plaintiff's Exhibit A, filed with his petition in the Court of Private Land Claims, with which the translation made in the Surveyor General's office are also copied as a part of said exhibit.

Upon the trial of said cause, all of the original papers mentioned in said Exhibit A were introduced in evidence by plaintiff, also in the said trial there was introduced in evidence by plaintiff the testimony of various other witnesses taken in said cause, to wit, Juan Abelos, p. 22; Pedro Melenudo, p. 35; Pedro Balisan, p. 48; Gregoria Herrera, p. 52; Jesus Velarde, p. 61;

Vicente Garcia, p. 72; Jesus Enriques, p. 81; Eugene van Patten, p. 89; eight witnesses in all, and also the evidence of two other witnesses taken by direction of the Surveyor-General of New Mexico; to wit, Clemente Nanes, p. 113; and Maximo Castanado, p. 114, all of whom testified as to the occupation and possession of the lands in question by Francisco Garcia and his heirs, and as to the location of the boundaries, making, with those in Exhibit A, sixteen witnesses to that effect.

Also, the plaintiffs introduced as witnesses Sostenos Roderigues, p. 68, and Solomon C. Schulz, p. 69, both as to the record of the original of Plaintiff's Exhibit A, in the Archives at El Paso.

Also, Samuel B. Bean, an old soldier, of Doniphan's Expedition in the Mexican war, as to being quartered in the house of Jose Maria Garcia, adjoining the room in which the Archives of Paso del Norte were kept, and connected therewith by an unlocked and open door, and as to the use and destruction of said Archives by said American soldiers quartered there.

It was also stipulated (p. 144) that M. R. Pendell, the petitioner (plaintiff), has succeeded at least to a portion of the interest held by Francisco Garcia in the said property, which it was admitted therein was sufficient to authorize him to invoke the jurisdiction of the Court in said cause.

And also, that the Plaintiff's Exhibits from 5–11 might be omitted from the Transcript.

The Government only introduced some documentary evidence, and two witnesses as to the location of natural objects, showing the boundaries; but nothing which tended to contradict the evidence introduced by the plaintiffs. The Court of Private Land Claims rendered a decree confirming the grant (Trans., pp. 212–215), the opinion as to the same being rendered by Justice Sluss, with whom the Chief Justice and two associates concurred (pp. 139, 140 and 141). Justice Murray alone dissented.

The decree of the Court finds that, prior to 1790,

on the petition of Francisco Garcia, the authorities and representatives of the Kingdom of Spain, by virtue of the power in them vested, and in accordance with the laws, usages and customs of said Kingdom, made to Francisco Garcia a grant of the tract of land in question; that Garcia was duly placed in possession thereof, and the same continued in his possession, and that of his heirs and legal representatives and assigns, from prior to 1790 to the present time; and that the petitioner had succeeded in part to the rights of said grantee. And, that, by reason of said facts an imperfect or equitable title and right, such as the United States under the treaty ought to recognize and confirm, to said land, was vested in said original grantee aforesaid, which right existed at the time the United States acquired sovereignty over that portion of country where the grant is situate, and that the petitioners are entitled to have the grant confirmed to the heirs, representatives and assigns of said grantee; and that the said private land-claim is a valid claim against the United States for the said land, and that the same be thereby confirmed, as therein designated and bounded.

ARGUMENT AND AUTHORITIES.

It will be seen the Court of Private Land Claims finds there was a grant of the land in question, duly made, prior to 1790, and that it has been possessed by the grantee, his heirs, legal representatives and assigns to the present time. To wit: 110 years, and 64 years prior to the treaty of Gadsden.

What is the evidence of this grant? It consists in the record of proceedings had before the second judge of 1st instance in January, 1853, to perpetuate the evidence of the grant made in the 18th century, quiet the title thereof, and to have the same

again formally placed in his possession, with all the boundaries made certain and a record made thereof so as to "serve them as title and security" to the same; also evidence of long and immemorial possession thereof—over 110 years, and over 64 years before the treaty of Gadsden.

Those proceedings are a matter of record in the Archives of Paso del Norte. Said possession supplies the absence of the original grant papers and record. They contain the evidence that the grant was made, and the evidence that the grant was in existence and in the Archives. Those proceedings being of record complies with what was contemplated by the 6th Art. of the treaty of Gadsden, which says: "Nor will any grants made previously (to September 25, 1853) *be respected or considered as obligatory* which have not been located and duly recorded in the Archives of Mexico."

What do those proceedings, which are inserted in full (Plaintiff's Exhibit A), show as evidence of a grant?

The 2nd Judge of 1st instance finds therein that they showed at the date thereof that Jose Maria Garcia, executor, etc., had proved (justificado—better translated, established or justified)—legally the possession that for many years they had had of said ranch; that it appearing that they even had titles to said property, and those have been lost.

And that, from what appears from the will and said proceedings, "there is given" to the executor, Jose Maria Garcia, for himself, and in the name of his co-heirs, without prejudice to any third party, proving a better right, *the real, actual, personal, corporal possession* or, *that which better corresponds in law, by reason of immemorial possession of the Santa Teresa ranch, with the enjoyments and benefits of the lands, woods and pastures, and all other products, to be found on said premises; and that he be protected and defended therein, warning all not to interrupt or molest him in said possession, and free use that he may deem fit to make thereof.*"

This is the solemn finding and decree of a court of a foreign country of competent jurisdiction in a legal proceeding pending before it.

It has always been held that the acts of officers of a foreign country done in the line of their authority, are presumed to be legal and according to law.

This proposition is so well established that a citation of authorities is unnecessary.

This Court cannot question that finding. If it could, still there is evidence in said proceedings, fully to justify the finding and decree.

An examination of the evidence of Franco Rascon, the first witness in that proceeding, in his answer to the third interrogatory, will be sufficient to satisfy the Court as to the propriety of that finding, especially when considered in connection with the accompanying fact of long and immemorial possession (which must always, when existing, be considered when determining as to the existence of documentary title).

The evidence of said first witness, Franco Rascon, p. 5, when properly translated alone shows beyond question the correctness of that finding. It there appears said witness Rascon "*frequently*" *had in his hands the original* (*primordial*) *documents* of the ranch, executed (autorizado) by a Lieutenant-Governor in that country; that his father had been an official, or public employee ("empleado") in Paso del Norte, a little after 1820; *that he saw in the Archives* (archivo meaning depository of public papers) of his father's office, filed or made into a protocol (protocolisado) the possession(meaning said documents) of said ranch previously referred to.

Here is a plain, clear statement of the existence of the grant in the public records, or Archives at that town. It will be noticed that the word "Archivo" (Archives) is spelled with a capital A, denoting something certain and particular, such as a proper name, which could only refer to the thing generally known as an Archive, belonging to the

public, or something of a conspicuous character, distinct from a private character, or private papers.

The word "Archivo" is translated both by Lopez & Bently and by Velasquez in their English and Spanish dictionaries, as "Archives, the place where public records are kept." The Century Dictionary defines archives as—"The place where records are kept—the records themselves; place where public records or other historical documents are kept." Both Lopez and Bently and Velasquez define the word "empleado" (translated in Ex. A as employee) as meaning "Placeman, one who exercises or fills a public station and who enjoys a salary from the Government." The word "protocolisado" is also defined by them as "being made into a protocol, such as a notary's record," &c.

That witness in his testimony says that the said title papers were lost when the Americans took possession of the "Archives of the town," and occupied the house of José Maria Garcia. This witness, without doubt, in speaking of the loss, referred to the originul documents of the ranch which he had had in his hands "frequently" in the "Archives" of the office where his father was a public employee. He designates the Archives as being the Archives of the town, and it was there he saw them, filed or registered (protocolisado), and it is these which he says were lost. This evidence must have been understood by the 2d judge of the 1st instance, being a Spanish-speaking officer, and it being given in his own language; and his opinion or finding was made up from that evidence. The evidence of that witness, however, in the Court of Private Land Claims, is corroborated by the evidence from S. B. Bean, p. 70, one of the American soldiers, who says they occupied a room in Jose Maria Garcia's house, adjoining the public archives, into which there was a door unlocked and open. He says that the boys frequented the room of the Archives and destroyed the papers of the Archives outrageously; a great many of them; that

they used to tear them in pieces; the more damage they could do to them the better. From his evidence, it appears that the Archives were either in Garcia's house, or in a room immediately adjoining it and connected with it by an unlocked and open door through which the American soldiers had free access, and where they went and destroyed a great many of the papers, which he understood to be *public records or archives.*

It appears from the evidence of the first three witnesses in those proceedings that, not only were many of the Archive papers taken and destroyed, but also the papers of Jose Maria Garcia, including the documents he had with reference to the ranch in question. But, the witness, Rascon, says the original (primordial) documents were in the Archives, and that they were lost at that time, and this is, in effect, so found by the judge of the 1st instance. He says in his findings that Garcias "even had titles to said property, and these have been lost," this means title of documentary or record character; it means something complete and definite, and not incomplete or indefinite; it means that the titles of the Garcia's had all of the requisites and formalities of a complete, valid, legal and binding title from the commencement, vesting the property absolutely in them, something different from long or immemorial possession, which also makes title, which, he says, is "still better."

Although Justice Murray in his dissent says: "It was not necessary, under the laws of Spain and Mexico, in order to vest the grantee with a valid or legal title, that the grant should be recorded in the Archives." We respectfully differ with him in this statement. It was the general requirement and practice, both in Spain and Mexico, in making grants for land, to make an original copy, which was sometimes called the matrix, and to form out of a collection of all the original papers an expediente, which was deposited (protocolisado) in the

Archives, and that took the place of a record or register, and is exactly what was meant by the word "protocolisado" used by the first witness, Franco Rascon, in speaking of the papers, which he "frequently" had in his hands in the archives of his father's office.

If this witness had not meant that those were public archives, or public papers, but were private papers in the house of Garcia, he would have said that his father was a dependent or clerk of Jose Maria Garcia and that the papers he had in his hands were among the papers of Jose Maria Garcia in his house, where his father was occupied, and not used the language contained in his evidence.

The next step towards making a grant, which was in no manner necessary to the validity of the grant of land, was the preparing of a testimonio, that is, a certified copy of the *expediente*, which was to be given to the grantee, and was to serve him as his evidence of title. This was almost the universal practice; sometimes, however in New Mexico, the testimonio was placed in the archives, and the original (*expediente*) given out to the grantee. This was evidently done by mistake, but it was never considered to be a vital error, but it was the universal rule to always leave a copy, generally the original, in the archives. Sometimes, when such original or record copy has been missing, the same has been supplied or accounted for, by showing a long, continuous, open, notorious and adverse possession of the property under a claim to the same by virtue of the grant, most generally, the copy in the hands of the grantee, or accounted for. This simply presumed a grant to the property which had been duly deposited in the archives and lost.

This Court have constantly rejected grants simply because there was no record of them, and no sufficient long, continuous adverse possession, such as to invoke the presumption of a record; and, on the other hand, they have frequently confirmed grants

of which there was no record evidence, when open, long, continuous, notorious and adverse possession was shown for as much as a period of twenty years, much less than the possession shown in this case.

Here, however, we have direct proof of the existence of the grant papers, in the Archives at Paso del Norte, of their loss, or destruction through the instrumentality of the American troops, and of the loss of a large portion of the Archives of that town, and also of the papers of Jose Maria Garcia, in whose house the Archives were either kept, or were kept in a room adjoining thereto, which communicated with his house by an unlocked and open door, where the American troops were quartered, and where the soldiers frequented, who destroyed or carried off his papers as well as a large quantity of the Archives.

The evidence shows not only the loss of the papers which Jose Maria Garcia may have had individually, in regard to this ranch, but the actual loss from the Archives of the original thereof, which was therein deposited. This is incontrovertible.

To this evidence we must add that upon which the Mexican Court made the finding that the Garcia's had proved or established legally the possession, that for many years they had held possession of the ranch, and that it appeared they even had titles to the property, and those had been lost, and that which better corresponded in law, by reason of immemorial possession of said ranch. This is a finding, first, of possession for many years; second, of actual titles to the property; third, of immemorial possession thereof, which the Court says is better than a title, and which must mean that it carried everything and included everything to make a complete and perfect title to said land.

The Land Court based its judgment, not only upon the actual existence of a grant, made prior to 1790, but upon the long possession, proven for fully

one hundred and ten years, and as much as sixty-four years before the treaty.

The opinion of the Court in the case rests upon the law as laid down in United States *v.* Chaves, 159 U. S., 542, where the Court say:

"It is the general rule of American law that a grant will be presumed upon proof of adverse, exclusive and uninterrupted possession for 20 years, and that such rule will be applied as a *presumptio juris et de jure, whenever by principle a right may be acquired in any manner known to the law.* * * * Nothing, it is true, can be claimed by prescription which owes its origin to and can only be had by matter of record; but, *lapse of time, accompanied by acts done, or other circumstances, may warrant a jury in presuming a grant or title by record.* * * * If the adverse claim could have had a legal commencement, juries are advised or instructed *to presume such commencement, after many years of uninterrupted possession or enjoyment.*"

The foregoing decision was reaffirmed in United States *vs.* Chaves, 175 U. S., 523; and it is on this case that the Land Court particularly relies to support its decree. The Court says therein:

"The principle of the cases is not *limited or satisfied by the prescription of only one step in the title. It requires the presumption of all that may be necessary* to the repose of the title; to the absolute assurance and quietude of the possession."

The Court proceeding, quoted therein with approval from the Supreme Court of Tennessee, 2 Head, 697, this statement of the law, to wit:

"There is hardly a species of act or document, public or private, that will not be presumed in support of possession, even Acts of Parliament may thus be presumed, as also will grants from the Crown."

The Court then proceeding stated:

"The possession of the land began in wrong or it began in right. *If in wrong, it must be shown.*"

This Court also in Ely's Adm. *vs.* The United States, 171 U. S., 233, say:

"While, of course, time does not run against the Government and no prescription may be affirmed, perhaps, in favor of the validity of this grant, yet the *inaction* of the Government during these many years is very persuasive, not merely, that it conceded the intendant had the power to make the sale, but that, in fact, he did make the sale under such power."

It will be seen by these decisions that even if there was no actual documentary evidence of a grant, yet the open, notorious, continuous, adverse, possession of the tract under the claim of title by grant for twenty years or more would invoke in favor of the claimant the presumption of the existence of a grant, and not only that, but a presumption of the existence of every fact necessary to make a valid and complete grant including the requisite or necessary record thereof. The Chaves case, 175 U. S., 523, distinctly holds such to be the law, and also that in such case if the grant *commenced in wrong, the burden was upon the Government to show the wrong.* The Government has not attempted in this case to show the absence of a record or that the possession commenced in wrong.

According to these decisions, which certainly were and are a rule of practice and of evidence to us, as well as a rule of property, the long possession, for sixty-four years, prior to the promulgation of the treaty, and 110 years prior to this date, is sufficient to establish *every essential element of a grant to the land in question.* The question involved in the dissent of Justice Murray, that no record is shown, is directly met by the decision in 159 U. S., p. 542, where the Court say:

"Nothing, it is true, can be claimed by prescription, which owes its origin to, and can only be had by matter of record; but lapse of time, accompanied by acts done, or other circumstances, may warrant a jury in presuming a grant, *or title by record.* * * *

If the adverse claim could have had a legal commencement, juries are advised, or instructed, to presume such commencement, after many years of uninterrupted possession or enjoyment."

Justice Murray seeks to escape from that decision by saying, a legal grant did not require a record, to be legal, therefore it had a legal commencement. That is merely begging the question. If a grant could be made legal without ever making any record, except the matter was prevented, like that in the Fremont case, 19 How., by a change of sovereignty very soon after the grant was made, is it to be presumed that the Mexican Government, knowing such fact that its citizens might hold valid titles of long standing by way of legal grants which were not on record, would have destroyed such titles of its citizens by agreeing that, although there might be such legal grants, which had not been registered, yet such should be "invalid and not recognized by this Government, to which it was transferring them. If there were legal grants and of long standing, without a record which were valid, certainly the Mexican Government would have preserved the rights of its citizens therein by providing a time for their record within a given period thereafter, if the treaty otherwise was to annul them, and would not have consented to the arbitrary confiscation of their property for the benefit of a foreign Power as is insisted by the attorney of the Government.

It may be asked why incorporate that provision in the treaty? It was intended, without doubt, if it means what Justice Murray claims it does, to operate upon grants of recent origin which had not been perfected. The provision is, first, that grants made subsequent to September 25, 1853 (perfect or not) should not be "considered valid or be recognized by the United States." The second provision is that those made prior and not located and registered should not "be respected or be considered as obligatory." This evidently intended to refer to

grants which might have been made shortly before the treaty, and in which the granting decree had been made, as in the Fremont case, 19 How., but for some reason juridical possession had not been given so as to properly locate and define the boundaries of the property and of which no record has been made, because the officer who should give the juridical possession had not been able to do so or had neglected or failed to return the same to the Archives. Such grants as that would not be affected by long-continued possession because there would be no such long possession; but if a grant should have been made fifty or a hundred years before, and the grantee and his legal representatives should have remained in continuous, adverse, open and notorious possession during the time claiming under the grant, although no record could be found, and the Government had remained inactive and tacitly acquiesced in the possession a complete and valid grant, including a record under these decisions, would be presumed. The record would be presumed from the fact of the inaction of the Government, and that it had acquiesced in the possession of the claim and land during all that time, as alleged in the Ely case, 171 U. S., 233.

International law provides that, on the change of sovereignty, property rights remain undisturbed. No government can be presumed to sacrifice, in the face of this principle, the rights of its citizens, arbitrarily, especially without force being used to compel it. It must be construed, if possible, to harmonize with international law; if it does not, it must be strictly construed. If a grant could be presumed at the date of the Gadsden treaty, in 1853, by virtue of long-continued, adverse, immemorial possession under claim of right, and the inaction of the Government and acquiescence, everything else could be presumed which was necessary to make such right complete, then the principle of international law will compel that property to be respected under the treaty, as complying with the law and as being un-

changed in its right; everything will be presumed in favor of such right of property necessary to make it complete and perfect. No such state of fact exists in this case as would require this grant to be forfeited; that could only be done in case of an incomplete grant of *recent date* at the time of the treaty. A grant might be made shortly prior to the treaty, yet possession not delivered. The officer in such case may not have filed the papers in the Archives, the grant may never have been located; in such case there could be no presumption, because there would not be sufficient time of possession.

Even if the grant had not been recorded, and there could be no presumption from the possession that it was recorded in the Archives, as originally made, yet does not the legal proceeding to perpetuate the evidence thereof, when the same is shown to be lost, takes its place, and stand as evidence of title? If those proceedings are recorded, or deposited in the Archives, is that not sufficient? What was required to be recorded? It was only the documentary evidence of the grant having been made. They are not the grant, but only the evidence of it. When the grant was required to be recorded, it was only the documentary evidence to show it. The legal proceedings perpetuating the evidence of that fact, become evidences themselves of the fact and take the place of those they perpetuate; they were recorded as the evidence shows; they established the existence of the grant, its boundary, limitation and extent, and everything that was required in good faith to notify this Government of the existence of the grant and of the title of claimant and his assignors, and what this Government should respect. We insist that the claimants have shown a substantial compliance with the requirements of the law and the treaty. In fact, also by establishing a presumption by long-continued, adverse possession which must be recognized as controlling.

An examination of Section 6 of the law will show that it is not only grants which may be confirmed, but any concession, warrant or survey of the land, such as the United States is "bound to recognize" are to be looked into and confirmed, if valid. Is not this in one sense a survey of the land in question by a judicial authority, by which the land is located exactly as to quantity and boundary, and the title thereof established and set at rest, and a decree rendered that it is held by a title from the Spanish authorities, and that the holding shall be protected and defended, and no one shall molest or disturb it, except after trial in court and on judgment rendered? Could there be a stronger case of the actual existence of a grant, and of its record and of its possession under a claim of title by grant, where the original grant was lost? Could better faith be shown than has been shown in this case?

Section 6 of the treaty provides that only grants made after September 25, 1853, will be considered invalid and not recognized; but that grants made before that date shall not "be respected or be considered as obligatory," but does not say they will not be considered valid, or not recognized as in the first part of the Section, where they were made after September 25, 1853.

Assuming, for the sake of argument, that there is no record in the Archives of the original grant of the land in question which has been sufficiently proven, yet it is apparently conceded that, in any event, the grant in question should be confirmed, unless the 6th clause of the Gadsden treaty prohibits it. This concedes that, prior to the treaty, Garcia had a legal and valid right and title to the property, good under Mexico and against that Government. If that clause of the treaty would forfeit or confiscate claimants' legal and valid right and title in the property, it is in derogation of international law, common law and civil law, and must be strictly construed. If a construction can be had which will avoid a forfeiture, that must be made.

That clause contains two provisions, one referring to grants made after September 25, 1853, which "will not be considered as valid or recognized"; the other, that grants made prior to that date, if not located or duly recorded, in the Archives of Mexico, "will not be respected or *be considered as obligatory.*"

This implies that all grants made prior to September 25, 1853, which *had been* located, and duly recorded in the Archives, should be respected as obligatory, and be considered as obligatory, and that no objections could be made to them.

The first provision makes the grants absolutely invalid. If such was to be the effect of the second provision, applied to unlocated and unrecorded grants, why use different language than that used in the first; or place them in a different class? Why not use the same language, and a single classification?

Evidently some difference was intended. What is it?

FIRST, that grants made after September 25, 1853, were *invalid.*

SECOND, that grants made prior to September 25, 1853, and located and duly recorded were unquestionably *valid.*

THIRD, grants made prior to September 25, 1853, and not located and duly recorded were to be considered as imperfect, and this Government was not *obligated* to respect or consider them.

There is no punctuation mark in the treaty after the word "respected" so as to separate it from connection with the word "considered," as bearing upon the word "obligatory;" and the clause should be construed as if it read "nor will any grants made previously be respected as obligatory, or considered as obligatory which had not been located and duly recorded," &c.

In the first case, the grants are made invalid. In the second, they are made valid. In the third, they are left as inchoate, or imperfect grants; the Government can repudiate them, or recognize them. It is left to the Government to take the bit in its mouth and confiscate the property of an individual arbitrarily which has been acquired and held in good faith, or confirm it. What is the moral and legal duty of the Government? Should it ignore all law, international, common and civil, and all right, and violently appropriate to its use the property of an individual acquired and held in good faith by a valid title under a former Government? It seems that José Maria Garcia migrated into, and doubtless became a citizen of the United States. Very probably with the change of sovereignty over that territory. He at least followed his property and stayed with it. Surveyor-General Julian, page 137, says: "The facts would establish a pretty strong equitable claim if not a legal one; but for the 6th Article of the Gadsden treaty." * * * He then says: "As I understand it, no grant of land, comprised within the territory covered by this treaty can be recognized by the United States as valid, whether the date be prior or subsequent to the time specified, unless the grant shall have been duly recorded in the Archives." He thus construes both provisions of that clause as having the same effect. He does not consider or allow the use of different language in different terms as conveying different meanings. Justice Murray, in dissenting, misquotes the treaty, but takes the same position as that taken by General Julian. Neither of them drew any distinction between the language used as to grants subsequently made and that used as to those previously made, where there had been no location or record. The first of those provisions makes the grant absolutely invalid; the other only provides the United States shall not be obliged to respect or consider it, and leaves them free to do in regard to it as they may deem just and right.

This being the case, by the treaty, if the grant is not shown, or presumed to have been recorded, it stands, so far as the obligations of the United States is concerned, as an imperfect or inchoate grant, which the Government can either repudiate or respect and consider. What is its obligation in such case? Certainly, it should be, to look into the good faith of the grantee and owners, and its obligation to respect private property. Where will that lead, according to the spirit of our institutions? If this grant should be rejected, this property goes to the use of the Government, and the property rights of the grantees and their representatives and assigns therein, will be taken and assumed by this Government without compensation, because it has the power to do so. This will be in violation of the provision of the Constitution forbidding that private property should be taken for public use without just compensation. In considering these matters, the constitution and spirit of our Government must be taken into consideration; and what is right and just should be done in view of the rights of the individual whose property may be forfeited or confiscated by arbitrary action.

It is not admitted, however, that this condition of things exist; the claimants insist strenuously that it has been shown their grant was of record in the Archives at Paso del Norte, and was lost by vandalism perpetrated thereon by American troops under the control of this Government. They further strenuously insist, even if no such record existed which could be shown, that still the long, continued, uninterrupted and exclusive possession and occupation of the grantee, his heirs and assigns, creates such a presumption in favor of the grant that a record thereof in the proper Archives must be presumed, particularly on account of the *inaction* of the Mexican Governmemt for nearly sixty-five years and of this Government for forty-five more in reference to said land.

This Court in the Ely case, 171 U. S., 233, speak-

ing of the construction of the treaty and of the act of Congress organizing the Land Court, said:

"In other words, in harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good afterwards; that which the law would enforce before, should be enforceable after the cession."

This language of this Court defines the duty of the Government in regard to this claim. Assuming that no grant or record of a grant has been proven for the sake of argument, still a record has been shown, which establishes the existence of a grant and perpetuates the evidence thereof, as well as a record thereof; and this has been shown from the records in the Archives in Mexico. Possession of the land has been shown since prior to 1790. It has been officially recognized as valid by the authorities of Mexico, while the country belonged to Mexico. It was enforceable under the laws of Mexico; it was property under the laws of Mexico; it came to our country as private property of the Garcias. The treaty did not declare it to be invalid, or say it should be recognized, but simply said in the absence of a location and of a record, it should not be respected and considered as obligatory. That is to say, our Government was at liberty to repudiate it, or confirm it according to right and justice and the true merits of the case. According to the declaration of the treaty, if there had been actually no record of the grant, it stood as inchoate, imperfect, subject to the will of our Government, recognized as property by international law and by the law of Mexico, belonging to individuals, and coming to our Government as such we cannot justly forfeit it. We cannot take it without adequate compensation; we cannot confiscate it, because there is no reason for so

doing. The policy adopted by our Government in dealing with land grants everywhere has been to recognize the validity of grants, although incomplete, when made in good faith, and occupied and possessed in good faith, in accordance with the spirit and intention of the law and regulations under which the same was granted and the policy of the Government making the grant.

The grant in question possesses every element of good faith, and should be confirmed.

Notice will be taken of the fact that the judge of 1st instance after the judicial proceedings had by him, carried out his decree by again measuring the lands, defining the boundaries, and redelivering the actual possession. He decided that there was title; that there was immemorial possession and long possession; he decided that the party was entitled to the property and should be protected and defended in it. Was not this act of juridical possession another step by him in the matter of the original grant, perpetuating directly the evidence of the possession as well as the evidence of the grant, and would it not stand of itself as a record of the evidence of the grant.

Would not a person, bringing suit for the possession of that property against the person entering upon that tract of land and claiming the same as public domain, be entitled to recover judgment against him under those proceedings, and under that evidence so perpetuated, even though such person claims a license from the Government of the United States?

In the Supreme Court of the United States.

THE UNITED STATES,
Appellants,

vs.

M. R. PENDELL *and* J. ESCOBAR,
Appellees.

No 211

ADDITIONAL BRIEF OF APPELLEES IN REPLY.

T. B. CATRON,
Attorney of Appellees.

In the Supreme Court of the United States.

OCTOBER TERM, ~~1901.~~ 1901

THE UNITED STATES, Appellants, vs. M. R. PENDELL and J. ESCOBAR, Appellees.	No. 211.

ADDITIONAL BRIEF OF APPELLEES IN REPLY.

Since the preparation and placing in the hands of the printer of appellees' brief, the brief and argument of appellants have been received.

It is therein contended—

First.

"There is no sufficient proof of a grant lawfully and regularly derived from the Government of Spain or Mexico."

This objection is twofold:

1st. That a Lieutenant-Governor had no authority to make a grant.

2nd. That the documentary evidence of appellees (Ex. A) containing certain proceedings had by the

2nd Judge of 1st inst., are void, and constitute no evidence of a grant, and are not of a probative character.

As to the first of these propositions, it will be admitted that Lieutenant-Governors were officers allowed by Spanish law (Law 56, Title 2, Book 3, Reynolds, 44).

They had authority to make inchoate or imperfect grants, notwithstanding any authority of the Intendentes. This was expressly held in this Court in the case of a Spanish grant made near the end of the 18th century, in the territory of Louisiana, in the case of Chateau *vs.* United States, 9 Pet., 137; also in the case following of the same title. The Court say:

> "The Lieutenant-Governor was a sub-delegate, and as such had power to make inchoate grants."

On page 125 in the same case the Court say:

> "The transfer of power to make concessions of land belonging to the royal domain of Spain from the Governor-General to the Intendentes did not affect the power of the sub-delegate who made the concession. The order in this case is the foundation of the title, and it is now capable of being perfected into a complete title. It is properly capable of being alienated, of being subjected to debts, and as such is to be held as *sacred* and *inviolable* as other property."

This decision was by Chief Justice Marshall. In the case, Attorney-General Butler made the same objection which is made here. He insisted the decrees of the Lieutenant-Governor relied on by the petitioner in that case were made in contravention of the laws, ordinances, and regulations in force at the time when they bear date. The Court in that case and the one following it, and in several others, afterwards coming before it, overruled the objections, and held that Lieutenant-Governors had the

power to make *imperfect grants* which became property, and should be held "sacred and inviolate," and approved the grant.

It was thus held that the grant was an imperfect grant, and made by the Lieutenant-Governor. That is exactly the kind of grant which the law creating the Court of Private Land Claims requires shall be presented to it and adjudicated.

If the cases of the United States *vs.* Chaves, 159 U. S. 542, and United States *vs.* Chaves, ~~159~~ 163 U. S. 523, both cited and quoted from in appellees' first brief, were not sufficient to establish a conclusive presumption of the power of the Lieutenant-Governor, to make the grant, certainly the cases of Chateau *vs.* United States, *ut supra*, ought to settle that fact.

A grant, or concession, made by an officer, who is by law authorized to make it, carries with it *prima facie* evidence that it is within his power, and the burden of proof is upon him who urges the contrary, to show the officer has transcended his power.

United States *vs.* Arredondo, 6 Pet. 691.
Delassus *vs.* United States, 9 Pet. 134.
Perchman *vs.* United States, 7 Pet. 51.
United States *vs.* Clark, 8 Pet. 436.
Strother *vs.* Lucas, 12 Pet. 436.

In Strother *vs.* Lucas, 12 Pet. 437, the Court say:

> "No principle can be better established by authorities of this Court that the acts of an officer to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power."

This case seems to have been well considered, and reviews the questions of land titles in territories acquired by treaty, such as in this case, and points out what is property of the individual and that of the Government, and the duty of the Government under the treaty, and the rights of the individual to his property. It is instructive throughout in the high-

est degree, and is full of information. The Court's attention is respectfully called to it in full.

It is true, the petition for confirmation in this grant alleges the property to have been in New Biscay. It also states exactly where it is situate; that is, in the County of Dona Ana, New Mexico, and within the limits of the Gadsden purchase. As that part of the Gadsden purchase was a portion of the State of Chihuahua at the date of purchase, petitioner fell into the error through their attorneys of supposing it had always been a part of that State; but facts brought out since filing the petition for confirmation show that portion of the country was, during the most of the eighteenth century and the early part of the nineteenth century, a part of New Mexico. And it is known no changes were made within the last forty years, prior to 1823, in that regard. This Court will take notice of the location of the political divisions of Mexico at the time of making this grant so far as they have a bearing on the grant. Appellants in their brief do not claim it to have been a part of New Biscay, but say:

> "Assuming the grant to have been made about the year 1790, the locus of the grant was either in the province of New Mexico, or New Biscay."

Actually it was, as we believe now, in New Mexico, in 1890 and for some years prior thereto, and subsequent thereto, until about the latter part of 1823 or '24.

This Court will also take notice of the public officials who existed in those times in the sections of country which were then within the territories covered by the jurisdiction conferred by the law establishing the Court of Private Land Claims. Also of the fact, that, at all times, prior to 1823, there was a Governor in New Mexico, and generally two Lieutenant-Governors; always one, at Paso del Norte, and sometimes one, at Santa Fé, where the Governor himself resided, and that these Lieutenant-Gov-

ernors had all the powers of the Governor within their respective districts when the Governor was absent therefrom.

There never was a time when an intendente undertook to grant lands in New Mexico, nor was there ever a time when the Governors therein, and the Lieutenant-Governor at Paso del Norte, did not exercise such right. Of this, the Court must take notice.

Appellees contend that Paso del Norte was not a proper place for the Archives. This is untenable. Every jurisdiction in Mexico had within its limits, at its principal town, the headquarters of its principal officer, an archive of all public documents containing the public acts and doings of the officers in such districts, especially in those cities or towns where there were Governors, Lieutenant-Governors, Intendentes and other governing officers. Paso del Norte was the capital and principal town of a district, or political subdivision. It was the place for keeping the Archives of all public acts in that district, or political subdivision. This cannot safely be questioned. If the Lieutenant-Governor of that place or district, made the grant and had the right to do so, all his acts in so doing, including a deposit of the expediente in the Archives at that place, will be presumed to be legal and regular. The burden of proof to the contrary is on appellees.

It does not appear exactly when the grant was made; it is alleged prior to 1790. If so, it may have been prior to December 4, 1786, the date of the ordinance of Intendentes, and thereby all questions raised in respect to the same being required to be made by Intendentes may have been avoided; it may have been as late as 1805, when authority was given to the Governors of the internal provinces to make grants of three and four leagues of land to the wealthy, and two to the poor (Reynolds, 73 and 74). There is no evidence whatever when the decree of December 4, 1786, was promulgated in Paso del Norte or at Santa Fé. If

it was not promulgated until after the grant was made, it would not affect the grant, although the decree itself may have been signed by the King at that time. Much delay frequently occurred in making promulgations of decrees of the King. They had to cross the ocean, and go to the viceroys at Mexico, and from thence be sent out to other subordinate officers and from them still farther on. There were always delays of many months, and frequently of many years, and sometimes a decree was never promulgated in a department or district. There is not, and never was, any evidence that the ordinance of Intendentes of December 4, 1786, ever was promulgated at Paso del Norte, or at Santa Fé in New Mexico, nor as to when it was promulgated anywhere in New Biscay. It must be noticed that public matters were not handled as expeditiously in those times as they are to-day; they were not supplied with the present modern conveniences, nor facilities of quick transportation and mails. All writing had to be done by hand, communication between Spain and Mexico was very rare, and months were required to make the trip across the ocean to the City of Mexico. Delays there occurred, and then, the distance from Mexico, overland to El Paso, through a country infested by hostile Indians, which was over twelve hundred and fifty miles; to Santa Fé over sixteen hundred miles, all of which was overland and by horseback, or on foot, or by slow carriage, which made the trip only occasionally. Under the most favorable circumstances, it was impossible for a document to be delivered and promulgated in those remote districts when coming from Spain under two or three years, and generally not much under four or five years, and frequently it never was done.

Certainly, in this case, the grant claimed to have been made "could have had a legal commencement." In such case, the Court, in The United States *vs.* Chaves, 159 U. S. 542, say:

> "If the adverse claim could have had a legal commencement, juries are advised, or instructed

to presume such commencement, after many years of uninterrupted possession and enjoyment."

Also see, United States *vs.* Chaves, 175 U. S. 523.

In the last case, the Court say:

"Possession of the land began in wrong or it began in right. If in wrong, it must be shown."

Shown by whom? Upon whom is the burden to show the wrong commencement? Not upon the claimant, surely.

The next proposition of appellees in support of their first point is that the proceedings (Appellant's Ex. A) are void and have no probative force because, as they claim, they are *ex parte*, and no notice was given to any one as an adverse party.

In support thereof, they cite two undetermined cases in this Court from Arizona, to wit:

Aribica Land and Cattle Company *vs.* U. S., No. 153, and The San Francisco Grant No. 60, printed in the transcript in the Ely case. Neither of these has been seen by appellees, but both are alleged to contain some proceedings had in Sonora in land cases. It is believed they are not in point to support appellants' contention. It is insisted by appellees that, whatever might have been the mode of procedure practiced in Sonora, it was not controlling beyond Sonora's limits or at Paso del Norte, and that a different procedure might have been had in such cases at Paso del Norte which could be urged with equal force to show that the Sonora proceedings were irregular. Surely the Sonora proceedings did not establish for Paso del Norte, what was the law for correct procedure. As a matter of practice, it could have no greater force than the practice or procedure adopted at Paso del Norte.

Appellees in their argument have referred to Sec. 93 of the Mexican decree of May 23, 1837, and given

a pretended translation which is not exactly correct. A correct translation, as we interpret it, is as follows:

> "The judges of first instance in their respective territories shall take cognizance with the Alcaldes, the one first taking cognizance retaining it to the exclusion of the other, of the preparation of inventories, judicial proceedings *ad perpetuam*, (judicial proceedings to perpetuate evidence of facts) and other legal proceedings of similar nature in which at the time there may be no opposition from any one."

Appellees cite Escriche's Law Dictionary and Moreau and Carlton's Siete Partidas as to what is meant by proceedings *ad perpetuam*. Those sections cited and quoted only refer to the general rule or practice in reference to perpetuating the evidence of certain classes of witnesses, to be used in a case pending or to be commenced. They did not refer to a case such as this, where there is no case pending and never could be. Neither did Section 93 of the decree of May 23, 1837, refer to the class of cases mentioned in the two citations made by appellees. It referred to cases where there was no opposition from any party, or any one. In construing that decree it must be borne in mind that, in Mexico, the same as in the United States, the Government could not be sued or made a party to a suit.

That section, 93, is a provision in addition to the general rule of procedure in regard to perpetuating the evidence of particular classes of witnesses in cases pending or to be commenced. It provides that judges of first instance shall take cognizance of proceedings *ad perpetuam* when there may be no opposition from any party, or any one. This does not mean party litigant, but it means when there is no opposing litigant, and was intended to reach just such a case as this, where the Government could not be made a party, and it did not appear any one claimed an interest, or that the Government itself had an interest. We insist that, in this case, it does not appear the Government had any interest;

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commenced and prosecuted, necessarily, before the corresponding judge of first instance, excepting cases in which ecclesiastics and military persons may be privileged otherwise; in conformity with the constitutional and other laws in force."

It is an established rule that, in courts of general jurisdiction, everything is presumed in favor of the regularity and legality of their procedure, even to the assumption of the issuance and service of process of summons. This Court has frequently so held, and it is therefore unnecessary to cite authority. It will be presumed that all necessary and requisite notices and citations were given and had in those proceedings before the 2d judge of the 1st instance, if any were required.

It has been frequently decided by this Court that

> "Every act of a court of competent jurisdiction shall be presumed to have been rightly done until the contrary appears."
>
> Voorhees *vs.* Bank, 10 Pet. 449.
> Williams *vs.* U. S., 1 How. 290.
> Nations *vs.* Johnston, 24 How. 165.
> Harvey *vs.* Tyle, 2 Wall. 328.
> B. & P. R. Arco *vs.* 6th Pres. Church, 94 U. S. 127.

Much more will it be held that the act of a court of a foreign country of competent jurisdiction shall be presumed to have been rightly done, for the reason that, in every foreign country, their system of procedure and administration of justice is peculiar to itself, and in such country the decree of a court which remains unreversed, must be presumed to have been justified by law, and that the Court, being learned therein, must have understood the law, and correctly interpreted it, not only as to the rights of the individuals, but also as to the procedure to reach the determination. They cannot be attacked collaterally, unless absolutely void. The decree in this case, to say the least for it, was not void, as appears

by the decision of this Court in Whitney *vs.* United States, 167 U. S., 529-543 and 544, which was cited by appellees, as sustaining their contention that said proceedings were void. They say they were similar in that case to the proceedings in this. We think they were very different. There a lieutenant of cavalry, Gallego, had entered upon the land claimed, asserting authority from the Governor, and claiming the property as public domain. A petition was made by the owner to the Alcalde, complaining of the acts of Gallego, who was not made a party. The petition, unverified, and without any evidence, alone was referred to the Governor. No proofs were taken. The Governor sustained the petitioner. He was the superior commander of the lieutenant, and the proceedings were of a most arbitrary and military character, and not in any way judicial or civil. No one was heard except the petitioner, and he not even under oath. The Alcalde, on the return to him of the Governor's decision, in an order reciting the same and the proceedings, stated that the same should remain as conclusive evidence of the rightful title of the heirs to the land granted, and its righful acquisition by them and their descendants from the King. And that the same should remain before any tribunal as evidence for all time of the title of the heirs to the tract of land. In construing those proceedings, this Court *did not say* the proceedings or actions in that matter *were void or of no probative effect*, but said, the exact contrary, that:

> "The proceedings in this litigation undoubtedly form a *strong item of testimony in favor of claimant's theory* of the case, and we are by *no means disposed to deny their weight.* * * * At the same time, they are by no means conclusive. The Crown was not a party or represented in the litigation."

The complaint was directly against the acts of a Government officer, who pretended to be acting by authority of the Governor, the representative of the

Crown. Yet this officer does not appear to have been cited or made a party. It was the act of an Alcalde, and a Military Governor based on an *ex parte* complaint of the claimants. Yet this Court, while saying the proceedings were "not conclusive," accept them as "a strong item of testimony in favor of claimant's theory of the case," and say they are "by no means disposed to deny their weight."

That certainly was a case of less formality than ours, based on less information, without any examination or procedure on an unverified petition. Yet, it had "great weight," but was not conclusive. That is as far as this Court went in declaring those proceedings void, or without probative effect.

If those proceedings formed "a strong item of testimony" and were accepted, why not the proceedings in this case, at least to the same extent? The proceedings here were judicial, and were by a court of competent jurisdiction. They were intended to supply the loss of title papers destroyed by the soldiers of this Government while in hostile occupation of the town of Paso del Norte, its Archives, and the property of Garcia. Certainly they were competent evidence under that decision, and entitled to weight as a "strong item of testimony" in favor of claimants. And should be considered in connection with all the facts therein stated, as well as those elsewhere appearing in the case.

It is claimed the Judge had no jurisdiction to make the decree. That application should have been made to the Governor to revalidate the grant. If the grant had actually been made, the loss of all papers and all records did not render it invalid; it was still a grant, and needed no revalidation. No application to the Governor was necessary. Besides the land then was within the State of Chihuahua, and the Governor of that State at that time had no such power. Juridical possession was always given by a judicial officer, generally, but not always, designated by the officer making the grant at the

time of making it, being the judicial officer in that vicinity; but on the loss of title papers and record of the grant or destruction of boundary monuments, so its lines could not be identified, such juridical possession could be reformed or again given by the judicial officer of the vicinity, and the monuments re-established, and the lines remarked at the same place. Even if the Governor in making a grant, which was sometimes the case, did not direct a judicial officer, of the jurisdiction, to give the possession, then the party, as was sometimes done, might apply to the judicial officer, himself, and have the possession given judicially, which was always considered as valid; as if the Governor had directed it. No law required the Governor to direct any particular officer, or any officer, to give the possession and mark the boundaries. That pertained directly to the judicial officer of that jurisdiction as part of his duty without direction, and it was always held that he could remark the boundaries and re-establish the monuments. To do so, he must necessarily take proofs, both as to the existence of the title, the grant or otherwise, and also as to the location of the boundary calls and monuments, so that he could establish them. Of this he was required to make a specific return to the Archives, the same as if he had done it by direction of the Governor, immediately after the grant was given; and it had the same probative effect, subject only to being questioned and overturned by affirmative action on proof that he had not established the correct boundaries or found a valid grant or title. But the question of objection to his actions were matters to be alleged and proven against them, and, until so done, his acts remained as *prima facie* evidence of everything determined by him, as stated in the case of Whitney *vs.* United States, *ut supra*.

The second proposition urged by appellees is:

> "The possession shown by plaintiff does not justify the presumption of a grant from competent authority."

Appellees make a review of the evidence in a perfunctory way, and in a manner, we believe, exceedingly unfair. The testimony is all before the Court and should be fully read and considered.

It is not insisted that the statutes of limitation will run against the Government of Spain or Mexico, except possibly in the case of "immemorial possession," which might prescribe the King and republic under Law 4, Title 8, Book 11, Reynolds 48, Appellants insist, however, that continuous adverse. exclusive possession for twenty years or more creates the presumption of a grant and the record thereof, especially in a case like this, where there is *prima facie* evidence to aid it, of the existence of a grant, and when the public authorities have recognized it more than once, and in more than one way. This by the proceedings before the Judge of 1st instance, in January, 1853, and prior thereto, in the Refugio grant, when it is referred to as the property of José Maria Garcia. The evidence taken in the proceedings before the Judge of 1st instance, consisted of six witnesses, all of whom speak of the Santa Teresa ranch having been the property of Francesco Garcia and his children, for many years, some knowing it as such since 1813. During this time the Garcias occupied it themselves with their servants and live stock, and had houses, corrals and other improvements thereon; the last three witnesses, Alejo Matinez, José Abalos and Julian Alday, all having been such servants and worked on the ranch, speak of the herds and flocks kept there, but also say they knew well the several adobe buildings of the "*principal house*" of the Santa Teresa ranch, corrals, and some shanties in which the servants lived, thus showing that, not only did the servants live there, but that there was a "principal house" evidently for the occupation of the Garcias and their families.

The first witness, Francisco Rascon, says he sometimes saw Francisco Garcia there, with his servants and herds. There is no pretence that, during the time testified to by these witnesses, any one ever

disputed the right of Francisco Garcia and his heirs to that property, or ever interfered with their right or occupation, except as claimed by the appellees during the last three years thereof, prior to January, 1853, when they claim from the evidence of one of the witnesses examined by the Land Court that he claimed some land there on the South side, but it is shown that that was south of the Piedras Paradas, and he and his father did not herd north of the Piedras Paradas.

The evidence of these eight witnesses was enough to establish the presumption of a grant and record thereof, without reference to other evidence, but taken in connection with all their evidence, it is conclusive. There was a claim by the Garcias, and admissions by the authorities that Garcias held the land by grant, every one acknowledged and respected them as the owners of the land by grant. The authorities investigated and decided they were the owners by title, by long possession, and by "immemorial possession," and again delivered the possession and re-marked the boundaries. No one, even under the evidence on cross-examination of the witnesses examined, by the Land Court, ever claimed any adverse right in said land against the Garcias, not even the witness who claimed that he and his father had a concession for a piece of the land, first stating it was from the Garcias and then from the Government of Mexico, finally stating it was to the south of the Piedras Paradas, but he did not know where it was.

We also have the evidence taken before the Surveyor General, of witnesses Nañes and Castañeda, pages 113 and 114. The first testified he knew the grant of Santa Teresa from 1840, during all which time it had been occupied by the heirs and children of Francisco Garcia and José Maria Garcia by living on it, by pasturing all kinds of animals on it, and by cultivating portions of it; that they had on it houses, corrals, and other improvements, which they and their servants occupied "*all the time*"

since 1840, up to a year or two before he testified in 1877. That, ever since he could remember he knew the property, was recognized and respected as the property of the Garcia heirs, who had all that time *held, possessed, cultivated, pastured, managed and controlled it as belonging to them by inheritance.* Castañeda testified June, 1877, he was then forty-eight years old; that he knew the property and had known it ever since he had use of reason; that he had always understood that the Santa Teresa ranch had always been considered and respected by every one as the property of Francisco Garcia and his heirs, under a grant from the Spanish Government; that he knew ever since he *had any knowledge*, that the heirs of said Garcia *had occupied and held said ranch as their property under claim of title by virtue of a grant from Spanish authorities* in Mexico up to a few years previous to the time he gave his evidence, when they sold to Escobar, who had since then occupied it; that during his recollection there had never been any interruptions in the possession of said ranch by said heirs up to the time they sold to Escobar. These two witnesses make a clear and clean case of occupation and possession of the property by residence, improvements, cultivation and pasturage for sixteen or eighteen years prior to July 4, 1854, the date of proclaiming the Gadsden treaty. Surely the proceedings before the 2d judge of the 1st instance in January, 1853, carries that possession and occupation back to the beginning of the 19th century, nearly, and makes a continuous exclusive, adverse possession for a period of half a century prior to the treaty.

The next line of evidence was that of the witnesses examined before the Land Court or some member of it. Only one of those witnesses goes back of 1850. Pedro Melenudo to 1842. He corroborates Nañes and Castañado. There were eight of those witnesses. They all testify they knew that the property in question was always *recognized* and

respected as the property of the Garcias; that José Maria Garcia, wife and children, lived there, cultivated the land, pastured animals on it, had servants and houses and other improvements there. Some of them say he gave permission for people to cut wood and pasture, sometimes, and prohibited others from doing so. Others of the witnesses, on cross-examination, say that people pastured and cut wood generally on both sides of the river. None of them state specifically that they cut wood or pastured within the grant, but they do say they cut and pastured below the grant, above it, and on the opposite side of the river, and then say on both sides of the river, without designating the locality. None of them, however, pretend that they knew such acts were done *in hostility* to the Garcias, but most of them show it was by his consent or permission; and generally the pasturing was by persons having animals from him on shares. None of them say such persons claimed any right hostile to the Garcias, or otherwise than under the Garcias, except the witness Velarde, who says he had an interest in the grant which Garcia gave him; but afterwards states the Government gave it to his father, but says it was south of the Piedras Parades; that he pastured his cattle on it, but only went up to the Santa Teresa, and that he was afterwards driven out by Escobar; that he had no documentary title. After saying that Garcia gave the interest, he says the Government of Mexico gave him the land when he was fifteen or sixteen years old; that he was then sixty-five years old. He could not have been twenty-one years old at the date of the Gadsen purchase. At folio 94, page 66, he says: His father claimed the land at Piedras Paradas *and no other place;* he afterwards states that he did not pasture above Piedras Paradas and could not say where the land was; that there were no documents for the same. There is no showing or any claim by any one *within* the grant, or of *any pasturage*, or *cutting of timber in the grant antagonistic to Garcia.*

When the testimony of the eight witnesses is considered, it will be seen there is nothing in it in conflict with the idea that all the pasturing within the grant, and cutting of wood within the grant, if any was cut, may have been in harmony with José Maria Garcia's claims. Some of the witnesses show that pasturing was done by his permission and by persons having the animals on shares from him; others that he gave permission to some to cut timber and refused it to others. Certainly all that is specifically pointed out as to pasturage, was either off the grant or by Garcia's consent. This tract of land was ten miles in length along the river-front. It was permissible at all times under the laws and customs of Spain and Mexico for owners of animals to have access to water, in arid regions, over the lands of others. Some of the witnesses show the animals were pastured out on the plains, and driven into the river for water. This is not inconsistent with the rights of Garcia, even if they went over his land, as they had a right of way to the water.

A fair consideration of the evidence of said eight witnesses will show that Garcia was recognized, acknowledged and respected by every one as the owner of the property in question, even by those who may at times have had animals on it, or may have cut wood thereon. He resided and had servants there, had personal possession, and constant use of the property, and put his animals on shares with other parties who, it seems, he permitted to pasture there.

It is insisted that the Guadalupe Miranda Grant (invalid) pretended to have been made in July, 1851, conflicted with this property. Miranda was one of the witnesses in 1853 before the judge of 1st instance: he was at one time prior thereto Secretary of New Mexico; at another, he was commissioner of Mexico and Chihuahua to grant lands to colonists from New Mexico. This pretended grant to him was nearly all, if not all, to the south of the land in

question. It was at Muleros Hill, which was south, as shown, of the property in question. Some say, a league or more. That grant was held to be invalid, and there is no proof he ever possessed it, or claimed or did anything with it in hostility to the grant in question. If he had claimed it conflicted, he would have said so in his evidence before the judge of 1st instance. A proper construction of the evidence of said eight witnesses will add great strength to the possession of the Garcias previously shown, commencing as far back as 1813, and show a constant claim of right and title recognized and respected by every one, consistent with the said proceedings, and juridical possession had by the judge of 1st instance.

While appellants do not believe it necessary to claim a title by prescription, since long, continuous, uninterrupted possession will invoke a presumption of a grant, and of its record; yet, if necessary, does not Law 4, Title 8, Book 11, favor such title by "immemorial possession" of a place. The last part of that law says:

> "By that which the laws say that *the things* of the kingdom cannot be gained by time, the taxes and tributes due us should be understood."

Is this not a declaration that it shall be understood that only taxes and tributes are not to be gained, but that everything else may? The authority cited from Whitney's case, 171 U. S., by appellants intimates that bare pasturage only which may have been interrupted, was not sufficient to fix the extent or boundaries of a grant of itself. That case did not hold that pasturage, was no evidence of possession, or that it, when connected with actual occupation and residence of the party or his servants, and when coupled with actually designated boundaries and recognized by the public authorities and claimed up to those boundaries, was not evidence of possession which would aid in invoking the presumption of the grant.

The judge of 1st instance fixed a cottonwood tree, standing near the bank at Cobreña Bend, with three or four palmetto plants as the north boundary or boundary furthest up the river of the property in question.

One witness says, that tree was called alamo-naranjo, but stated it was *only one* league from Piedras Paradas, and that there was another tree called alamo de lemon, two or three leagues further up the river. The grant was four leagues long up the river from the Piedras Paradas Bend, and would extend to the last-named tree at least. There is no evidence identifying the tree which was marked as the north boundary. The Court did not seem to think so, as it did not designate any tree as the north boundary, but only the Cobreña Bend. That tree possibly was carried away by the river in its changes. The Cobreña Bend cannot be mistaken. Appellees claim the "Isla" was not in this property, but Plaintiff's Exhibit 16, between pages 120 and 121, which has been identified as a correct plat of the land, shows it to be south of the Cobreña Bend (Rincon), and this is not contradicted. The witnesses say, it is within the property in question.

The third proposition of appellees is:

> "There is no proof that this grant was duly recorded in the Archives of Mexico as required by Art. 6 of the Gadsden treaty."

This proposition has been argued in appellees' first brief sufficiently. Appellants cite various authorities to the effect that there should be a memorandum of the grant entered in a book (toma de Razon). That only applies to grants made in territories under and after the regulations of November 21, 1828, according to Section 9 thereof, which can in no manner apply to this grant.

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